

GailAnn Y. Stargardter (Bar No. 250749)
gstargardter@lslawoffices.com
LEHAVI STARGARDTER, LLP
P.O. Box 5973
Orange, CA 92863
Telephone: 949.570.9575
Facsimile: 949.570.9580

Attorneys for Plaintiff ATAIN SPECIALTY
INSURANCE COMPANY

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION

ATAIN SPECIALTY INSURANCE
COMPANY, a Michigan corporation,

Plaintiff,

v.

MEC INDUSTRIAL SERVICES, a
California corporation; WESTERN TUBE
& CONDUIT CORPORATION, a
California corporation; ZEKELMAN
INDUSTRIES, INC., a Delaware
corporation; ARTHUR ZIMMERMAN
III, an individual; JESSICA
ZIMMERMAN, an individual;
KATHERINE ZIMMERMAN, an
individual,

Defendants.

CASE NO. 5:23-cv-02372

**COMPLAINT FOR DECLARATORY
RELIEF AND REIMBURSEMENT**

COMES NOW Atain Specialty Insurance Company, and for its Complaint for
Declaratory Relief and Reimbursement, alleges, as follows:

JURISDICTION AND VENUE

1. Jurisdiction is founded upon Title 28 United States Code section 1332, as
there is complete diversity of citizenship between Plaintiff and Defendants in this action
and as the amount in controversy exceeds \$75,000, exclusive of interest and costs. This
Court also has jurisdiction over the case under the Declaratory Judgment Act, 28 U.S.C.

1 section 2201.

2 2. Venue is proper in the Central District of California pursuant to Title 28,
3 U.S.C. section 1391(b)(1) and (c)(2), in that Defendant MEC Industrial Services
4 (“MEC”) is a California corporation with its principal place of business in Garden Grove,
5 California; Western Tube & Conduit Corporation, a California corporation with its
6 principal place of business in Chicago, Illinois; Zekelman Industries, Inc. is a Delaware
7 corporation with a principal place of business in Chicago, Illinois; and Arthur
8 Zimmerman III, Jessica Zimmerman, and Katherine Zimmerman all reside in San
9 Bernardino, California and are subject to this Court’s personal jurisdiction at the time this
10 action is commenced. Venue is also proper in this district pursuant to Title 28 United
11 States Code section 1391(b)(2) as the insurance contract was issued to MEC in California
12 and the property where the underlying loss occurred is located in San Bernardino,
13 California.

14 **PARTIES**

15 3. Plaintiff Atain Specialty Insurance Company (“Atain”) is a corporation
16 organized and incorporated under the laws of the State of Michigan, with its principal
17 place of business in Farmington Hills, Michigan and is a surplus lines insurer approved
18 by the California Department of Insurance.

19 4. Defendant MEC Industrial Services (“MEC”) is a corporation organized and
20 existing under the laws of the State of California with its principal place of business in
21 the city of Garden Grove, California.

22 5. Defendant Western Tube & Conduit Corporation (“Western Tube”) is a
23 corporation organized and existing under the laws of the State of California, with its
24 principal place of business in Chicago, Illinois.

25 6. Defendant Zekelman Industries, Inc. (“Zekelman”) is a Delaware
26 corporation with a principal place of business in Chicago, Illinois.

27 7. Defendant Arthur Zimmerman III is an individual residing in San
28 Bernardino County, California.

1 Defendants and MEC.

2 16. The Complaint asserts a cause of action against Hiring Defendants for
3 Premises Liability against Hiring Defendants.

4 17. The Complaint alleges MEC acted negligently and violated governmental
5 safety regulations concerning the shut off of electricity before work is performed.

6 18. As a result of Defendants negligence, Zimmerman was killed, and his
7 children suffered and continue to suffer from the loss of his love, companionship, care,
8 comforts, affection, society, solace and moral support.

9 19. The cause of action for Premises Liability incorporates all of the preceding
10 paragraphs in the Complaint, and asserts that as the owners/operators/managers of the
11 premises Hiring Defendants had an obligation to maintain the premises in a safe
12 condition and to warn of latent/concealed hazardous conditions.

13 20. The cause of action for Premises Liability alleges that on January 27, 2023,
14 Zimmerman was an employee of a contractor (Zims), and that Hiring Defendants owed
15 Zimmerman, as an employee of one of its contractors, a duty of care to warn of
16 latent/concealed hazardous conditions on the premises. Hiring Defendants failed to warn
17 Zimmerman that the electricity to the Pillar Cabinet he had been instructed to remove had
18 not been disconnected. The dangerous condition on the premises caused Zimmerman's
19 death and caused his children to suffer and to continue to suffer from the loss of his love,
20 companionship, care, comforts, affection, society, solace and moral support.

21 **B. The Underlying Action – The Cross-Complaints**

22 21. Western Tube, Zekelman and Lottes filed a Cross-Complaint for equitable,
23 implied indemnity; contribution and apportionment; declaratory relief (duty to
24 defend/indemnify) and breach of contract (failure to obtain insurance); and express
25 indemnity against MEC.

26 22. MEC filed a Cross-Complaint for implied equitable indemnity against
27 Western Tube and Zekelman.

28 ///

1 **C. Contracts Between The Parties**

2 23. Hiring Defendants issued a Purchase Order to MEC. A true and correct copy
3 of the Purchase Order is attached hereto as **Exhibit B**, and incorporated herein by
4 reference.

5 24. The Purchase Order includes the following conditions:

6 **13. PERSONAL INJURY, DEATH AND PROPERTY DAMAGE.**

7 Seller shall indemnify and hold harmless Buyer from and against any and
8 losses, claims, damages, liabilities and expenses of any kind or nature
9 whatsoever, including attorneys' fees, which may arise out of, result from,
10 or be reasonably incurred in connection with Seller's performance of and
11 compliance with the provisions of this Purchase Order....

12 **14. INSURANCE.** Where fulfillment of this Purchase Order required
13 Seller to perform work on Buyer's premises, Seller shall procure at its
14 own cost and keep in force the following insurance, satisfactory to Buyer,
15 as to form and limits of liability until completion and final payment
16 hereunder:

- 17 a. Workers Compensation Insurance as required by the
18 Workman's Compensation laws of the state in which the work
19 is being performed;
- 20 b. Public Liability and Property Damage Insurance, including
21 contractual liability insurance as required to cover liabilities
22 assumed in Paragraph 13, and Automobile Liability and
23 Property Damage Insurance if automobile, trucks, trailers or
24 other vehicles are to be used.

25 Prior to the commencement of any work hereunder, evidence of such
26 insurance in policy or certificate form shall be deposited with the
27 Buyers' Accounting Department at the District or Division where the
28 goods are to be delivered or the services are to be performed. Where

any part of this Purchase Order is to be performed by a subcontractor or (sic) Seller, evidence of such insurance on behalf of such subcontractor similarly shall be provided by Seller to Buyer.

D. Tender Of Defense To Atain

25. MEC tendered defense of the Complaint and Cross-Complaint to Atain.

26. Atain accepted the defense of MEC subject to a full and complete reservation of rights, including its right to its right to file this action to seek a judicial determination of its rights and obligations under the policy and its right to seek reimbursement of all amounts paid to defend and indemnify MEC against the claims asserted in the Underlying Action. A true and correct copy of Atain's reservation of rights letter is attached hereto as **Exhibit C** and incorporated herein by reference.

27. Atain appointed defense counsel and has begun to incur defense fees and costs relating to the Underlying Action.

28. Western Tube tendered its defense to Atain. Atain rejected Western Tube's tender of defense as it is not an additional insured under Policy No. PRB13725.

E. The Atain Policy

29. Atain issued Policy No. PRB13725 to MEC for the policy period October 14, 2022 through October 14, 2023. A true and correct copy of Policy No. PRB13725 is attached hereto as **Exhibit D** and incorporated herein by reference.

30. Policy No. PRB13725 provides general liability coverage under Commercial General Liability Coverage Form CG 00 01 (04/13), which includes the following Insuring Agreement:

SECTION I – COVERAGES

**COVERAGE A BODILY INJURY AND PROPERTY DAMAGE
LIABILITY**

1. Insuring Agreement

a. We will pay those sums that the insured becomes legally obligated to pay as damages because of "bodily injury" or

1 “property damage” to which this insurance applies. We will
2 have the right and duty to defend the insured against any
3 “suit” seeking those damages. However, we will have no duty
4 to defend the insured against any “suit” seeking damages for
5 “bodily injury” or “property damage” to which this insurance
6 does not apply....

7 * * *

8 31. Commercial General Liability Coverage Form CG 00 01 (04/13), includes
9 the following Exclusions:

10 **2. Exclusions**

11 This insurance does not apply to:

12 * * *

13 **b. Contractual Liability**

14 “Bodily injury” or “property damage” for which the insured is
15 obligated to pay damages by reason of the assumption of
16 liability in a contract or agreement. This exclusion does not
17 apply to liability for damages:

- 18 (1) That the insured would have in the absence of the
19 contract or agreement; or
20 (2) Assumed in a contract or agreement that is an “insured
21 contract”, provided the “bodily injury” or “property
22 damage” occurs subsequent to the execution of the
23 contract or agreement. Solely for the purposes of
24 liability assumed in an “insured contract”, reasonable
25 attorneys’ fees and necessary litigation expenses
26 incurred by or for a party other than an insured are
27 deemed to be damages because of “bodily injury” or
28 “property damage”, provided:

- 1 (a) Liability to such party for, or for the cost of, that
 2 party's defense has also been assumed in the
 3 same "insured contract"; and
- 4 (b) Such attorneys' fees and litigation expenses are
 5 for defense of that party against a civil or
 6 alternative dispute resolution proceeding in which
 7 damages to which this insurance applies are
 8 alleged.

9 * * *

10 e. **Employer's Liability¹**

11 1. "Bodily injury" to:

- 12 a. any "employee", "temporary worker", "leased
 13 worker", or "volunteer worker" of any insured;
 14 b. any other person performing work or services for
 15 any insured; or
 16 c. any "subcontractor" or "independent contractor"
 17 or any "employee" of any "subcontractor" or
 18 "independent contractor"

19 arising out of and in the course of employment by or
 20 service to any insured for which any insured may be
 21 held liable as an employer or in any other capacity;

- 22 2. Any obligation of any insured to indemnify or
 23 contribute with another because of damages arising out
 24 of "bodily injury" to anyone identified in paragraph 1.
 25 of this endorsement;

26 ¹ As modified by Endorsement AF 000 839 (04/21)—**Employees, Subcontractors,**
 27 **Independent Contractors, Temporary Workers, Leased Workers or Volunteers,**
 28 which states: **I. Exclusion e., Employer's Liability** in Part 2, **Exclusions of SECTION I**
COVERAGES, COVERAGE A. BODILY INJURY AND PROPERTY DAMAGE
LIABILITY of the **COMMERCIAL GENERAL LIABILITY COVERAGE FORM**
 is replaced by the following....

1 3. “Bodily injury” sustained by the spouse, parent, brother,
2 sister, companion or offspring of anyone identified in
3 paragraph 1. of this endorsement;

4 4. Contractual liability as defined in Section I -
5 Exclusions, item 2 b. of the Commercial General
6 Liability Coverage Form CG 0001.

7 * * *

8 This exclusion applies to all causes of action arising, in whole or part, out
9 of “bodily injury” to anyone identified in paragraph 1. of this
10 endorsement, including care and loss of services.

11 When there is no coverage for any one insured under this endorsement,
12 coverage is also excluded for any other insured (and section IV.7.b of
13 form of the Commercial General Liability Coverage Form CG0001 shall
14 not apply).

15 32. Commercial General Liability Coverage Form CG 00 01 (04/13), includes
16 the following Provisions:

17 **SUPPLEMENTARY PAYMENTS—COVERAGES A AND B**

18 1. We will pay, with respect to any claim we investigate or settle, or
19 any “suit” against an insured we defend:

20 * * *

21 e. All court costs taxed against the insured in the “suit”.
22 However, these payments do not include attorneys’ fees or
23 attorneys’ expenses taxed against the insured.²

24 * * *

25 2. If we defend an insured against a “suit” and an indemnitee of the
26 insured is also named as a party to the “suit”, we will defend that
27 indemnitee if all of the following conditions are met:

28

² As amended by Endorsement AF001007 (06/17), Paragraph XIII, 1. E.

- a. The “suit” against the indemnitee seeks damages for which the insured has assumed the liability of the indemnitee in a contract or agreement that is an “insured contract”;
- b. This insurance applies to such liability assumed by the insured;
- c. The obligation to defend, or the cost of the defense of, that indemnitee, has also been assumed by the insured in the same “insured contract”;
- d. The allegations in the “suit” and the information we know about the “occurrence” are such that no conflict appears to exist between the interests of the insured and the interests of the indemnitee;
- e. The indemnitee and the insured ask us to conduct and control the defense of that indemnitee against such “suit” and agree that we can assign the same counsel to defend the insured and the indemnitee; and

* * *

So long as the above conditions are met, attorneys’ fees incurred by us in the defense of that indemnitee, necessary litigation expenses incurred by us and necessary litigation expenses incurred by the indemnitee at our request will be paid as Supplementary Payments.

* * *

33. Commercial General Liability Coverage Form CG 00 01 (04/13), includes the following definitions:

SECTION V – DEFINITIONS

* * *

3. “Bodily injury” means bodily injury, sickness or disease sustained by a person, including death resulting from any of these at any time.

* * *

9. “Insured contract”³ means:

* * *

f. That part of any other contract or agreement pertaining to your business (including an indemnification of a municipality in connection with work performed for a municipality) under which you assume the tort liability of another party to pay for “bodily injury” or “property damage” to a third person or organization, provided the “bodily injury” or “property damage” is caused, in whole or in part, by you or by those acting on your behalf. However, such part of a contract or agreement shall only be considered an “insured contract” to the extent our assumption of tort liability is permitted by law. Tort liability means a liability that would be imposed by law in the absence of any contract or agreement...

* * *

13. “Occurrence” means an accident, including continuous or repeated exposure to substantially the same general harmful conditions.

* * *

22. “Your work”:

a. Means:

- (1)** Work or operations performed by you or on your behalf; and
- (2)** Materials, parts or equipment furnished in connection with such work or operations.

b. Includes:

- (1)** Warranties or representations made at any time with

³As amended by Endorsement CG 24 26 (04/13).

1 respect to the fitness, quality, durability, performance or
2 use of “your work”; and (2) The providing of or
3 failure to provide warnings or instructions.

4 34. The policy includes the following Endorsement:

5 Endorsement CG 20 33 (04/13)—**ADDITIONAL INSURED—**
6 **OWNERS, LESSEES OR CONTRACTORS—AUTOMATIC**
7 **STATUS WHEN REQUIRED IN CONSTRUCTION AGREEMENT**
8 **WITH YOU.**

9 This Endorsement Changes the Policy. Please Read It Carefully.

10 This endorsement modifies insurance provided under the following:
11 **COMMERCIAL GENERAL LIABILITY COVERAGE PART**

12 **A. Section II—Who Is An Insured**, is amended to include as an
13 additional insured any person or organization for whom you are
14 performing operations when you and any such person or
15 organization have agreed in writing in a contract or agreement that
16 such person or organization be added as an additional insured under
17 the policy. Such person or organization is an additional insured
18 only with respect to liability for “bodily injury” “property damage
19 or “personal and advertising injury” caused, in whole or in part, by:

- 20 1. Your acts or omissions, or
21 2. The acts or omissions of those acting on your behalf;
22 in the performance of your ongoing operations for the additional
23 insured.

24 However, the insurance afforded to such additional insured:

- 25 1. Only applies to the extent permitted by law; and
26 2. Will not be broader than that which you are required by the
27 contract or agreement to provide for such additional insured.

28 A person’s or organization’s status as an additional insured under

1 this endorsement ends when your operations for that additional
2 insured are completed.

- 3 **B.** With respect to the insurance afforded to these additional insureds,
4 the following additional exclusions apply:

5 * * *

- 6 **2.** “Bodily injury” or “property damage” occurring after:

- 7 **a.** All work, including materials, parts or equipment
8 furnished in connection with such work, on the project
9 (other than service, maintenance or repairs) to be
10 performed by or on behalf of the additional insured(s) at
11 the location of the covered operations has been
12 completed; or
13 **b.** That portion of “your work” out of which the injury or
14 damage arises has been put to its intended use by any
15 person or organization other than another contractor or
16 subcontractor engaged in performing operations for a
17 principal as a part of the same project.

- 18 **C.** With respect to the insurance afforded to these additional insureds,
19 the following is added to **Section III—Limits Of Insurance:**

20 The most we will pay on behalf of the additional insured is the
21 amount of insurance:

- 22 **1.** Required by the contract or agreement you have entered into
23 with the additional insured; or
24 **2.** Available under the applicable Limits of Insurance shown in
25 the Declarations; whichever is less.

26 This endorsement shall not increase the applicable Limits of
27 Insurance shown in the Declarations.

- 28 **35.** The policy includes the following Endorsement:

**Endorsement AF 001 007 (06/17)—COMBINED COVERAGE AND
EXCLUSION ENDORSEMENT**

This Endorsement Changes the Policy. Please Read it Carefully.

* * *

This endorsement modifies insurance provided under the following
coverage parts if those coverage parts are included in your policy:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

* * *

VI. PROFESSIONAL SERVICES EXCLUSION

The following exclusion is added to Part 2. **Exclusions of
SECTION 1-COVERAGES, COVERAGE A BODILY INJURY
AND PROPERTY DAMAGE LIABILITY** and Part 2. **Exclusions
of COVERAGE B PERSONAL AND ADVERTISING INJURY
LIABILITY** of the **COMMERCIAL GENERAL LIABILITY
FORM.**

This insurance does not apply and there shall be no duty to defend or
indemnify any insured for any “occurrence”, “suit”, liability, demand
or cause of action arising, in whole or part, out of any claim
involving the rendering or failure to render any “professional
service.”

Further, when any insured has purchased or obtained errors and/or
omissions coverage or any other type of professional insurance
coverage and the claim, in any way arises, in whole or part, out of
the services performed by any insured, there shall be no duty to
defend or indemnify under this policy. Whether or not such E&O or
any other professional coverage has been purchased or obtained,
however, the first paragraph of this exclusion remains in full force
and effect.

1 “Professional Service” includes, but is not limited to, any of the
2 following: (1) accountant; (2) architect; (3) engineer; (4) insurance
3 agent or broker; (5) lawyer; (6) any medical professional; (7) real
4 estate agent or broker; (8) surveyor; (9) health inspector; (10) safety
5 inspector; (11) any service where an insured is retained or asked to
6 render an opinion, written or verbal, to a third-party; or (12) any
7 other service that is of a professional nature, regardless of whether a
8 license or certification is required.

9 **FIRST CAUSE OF ACTION**

10 **(Declaratory Relief – No Duty to Defend—MEC, Western Tube and Zekelman)**

11 36. For its First Cause of Action, Atain incorporates by reference, as if fully
12 restated, paragraphs 1 to 35, above.

13 37. Western Tube and Zekelman must prove the claims asserted against them in
14 the Complaint filed by the Zimmerman Children and Cross-Complaint filed by MEC in
15 the Underlying Action fall within the scope of the insuring agreements included in both
16 the Commercial General Liability Coverage Form CG 00 01 (04/13) and Additional
17 Insured Endorsement CG 20 33 (04/13).

18 38. Western Tube and Zekelman qualify as additional insureds under Policy No.
19 PRB13725 only if MEC, Western Tube and Zekelman, have agreed in writing, in a
20 contract or agreement, that Western Tube and Zekelman be added as an additional
21 insured under Policy No. PRB13725.

22 39. Neither Western Tube nor Zekelman have satisfied their burden of proving
23 the existence of a written contract or agreement between them and MEC requiring MEC
24 to name Western Tube and/or Zekelman as an additional insured under Policy No.
25 PRB13725.

26 40. Because neither Western Tube nor Zekelman have met their burden of
27 proving they qualify as an additional insured under Policy No. PRB13725, Atain has no
28 obligation to defend Western Tube or Zekelman against the claims asserted in the

1 Complaint filed by the Zimmerman Children or the Cross-Complaint filed by MEC in the
2 Underlying Action.

3 41. Even assuming Western Tube and Zekelman met their burden of proving
4 they qualify as additional insureds under Policy No. PRB13725, all potential coverage for
5 the claims asserted against Western Tube and Zekelman in both the Complaint and
6 Cross-Complaint is eliminated by Exclusion e. Employer's Liability.

7 42. All potential for the claims asserted against MEC in the Complaint filed by
8 the Zimmerman Children and in the Cross-Complaint filed by Western Tube and MEC in
9 the Underlying Action is eliminated by the Professional Services Exclusion included in
10 Endorsement AF 001 007 (06/17)—Combined Coverage And Exclusion Endorsement.

11 43. Atain has no obligation to treat defense costs incurred by MEC in defending
12 Western Tube or Zekelman under the indemnification provision in the Purchase Order
13 because neither Western Tube, Zekelman nor MEC can meet their burden of proving the
14 exception to the Contractual Liability Exclusion applies.

15 44. Atain has no obligation to defend Western Tube or Zekelman under the
16 Supplementary Payments provisions in Policy No. PRB13725 as Condition b., which
17 requires that the insurance apply to the liability assumed by MEC, has not and cannot be
18 satisfied.

19 45. For the reasons set forth in Paragraphs 37 through 44 above, Atain contends
20 that it has no duty to defend MEC, Western Tube or Zekelman against the claims asserted
21 in the Complaint filed by the Zimmerman Children or in the Cross-Complaints they have
22 filed against each other in the Underlying Action.

23 46. Atain is informed and believes that MEC, Western Tube, and Zekelman
24 dispute each of Atain's contentions and assert that Atain is obligated to afford them a
25 defense to the claims asserted in the Complaint filed by the Zimmerman Children and
26 Cross-Complaints they have filed against each other in the Underlying Action.

27 47. Atain therefore desires a judicial determination of its rights and liabilities, if
28 any, and a declaration that it has no duty to defend MEC, Western Tube, or Zekelman

1 with respect to any and all claims asserted against them in the Complaint or Cross-
2 Complaints filed in the Underlying Action.

3 48. Such declaration is necessary and appropriate because Atain has no plain,
4 speedy or adequate remedy at law, and by reason of such delay, will suffer great and
5 irreparable injury in that it has and will continue to incur defense costs and fees in
6 defending against claims that are not covered under its policy. Such a declaration is
7 appropriate in order that Atain, MEC, Western Tube and Zekelman may ascertain their
8 respective rights and duties under the policy issued by Atain to MEC. Such controversy is
9 incapable of resolution without judicial adjudication.

10 49. If the Court determines that Atain owes a duty to defend either MEC,
11 Western Tube or Zekelman under Policy No. PRB13725 for some, but not all, of the
12 claims asserted against MEC, Western Tube and/or Zekelman, Atain is entitled to and
13 desires an allocation between covered and non-covered claims for payment of any
14 attorney fees, costs, or investigative fees and costs incurred by it.

15 **SECOND CAUSE OF ACTION**

16 **(Declaratory Relief – No Duty to Indemnify—MEC, Western Tube, Zekelman or** 17 **the Zimmerman Children)**

18 50. For its Second Cause of Action, Atain incorporates by reference, as if fully
19 restated, paragraphs 1 to 49, above.

20 51. For the reasons set forth in Paragraphs 37-44 above, the Atain policy does
21 not afford any coverage for any settlements that may be entered into to resolve the
22 Underlying Action

23 52. For the reasons set forth in Paragraphs 37-44 above, Policy No. PRB13725
24 does not afford any coverage for any settlement that may be entered into to resolve the
25 Underlying Action or any judgment that may be entered against MEC, Western Tube
26 and/or Zekelman in the Underlying Action.

27 53. For the reasons set forth in Paragraphs 37-44 above, Atain has no obligation
28 to satisfy any settlement that may be entered into to resolve the Underlying Action or any

1 judgment that may be entered against MEC, Western Tube and/or Zekelman in either the
2 Complaint filed by the Zimmerman Children, or the Cross-Complaints filed against each
3 other in the Underlying Action.

4 54. For the reasons set forth in Paragraphs 37-44 above, Atain has no obligation
5 to satisfy any settlement or judgment that may be entered in favor of the Zimmerman
6 Children in the Underlying Action and which they may seek to enforce against Atain in
7 an action to recover that judgment from Atain under Cal. Insurance Code section 11580,
8 subdivision (b).

9 55. An actual controversy has arisen and now exists between Atain, on the one
10 hand, and MEC, Western Tube, Zekelman and the Zimmerman Children concerning their
11 respective rights and duties under the Atain policy.

12 56. Atain contends that it has no duty to indemnify MEC, Western Tube or
13 Zekelman against any settlement or judgment that may be entered into in the Underlying
14 Action or to satisfy any settlement or judgment the Zimmerman Children may receive in
15 the Underlying Action and seek to enforce against Atain under Cal. Insurance Code
16 section 11580, subdivision (b).

17 57. Atain is informed and believes that MEC, Western Tube, Zekelman and the
18 Zimmerman Children dispute each of Atain's contentions and assert that Atain is
19 obligated to indemnify MEC, Western Tube, Zekelman against the claims asserted in the
20 Underlying Action and to satisfy any settlements entered into by them, or judgments that
21 may be entered against them in that Action, and that the Zimmerman Children contend
22 Atain is obligated to satisfy any settlement or judgment they may obtain against MEC,
23 Western Tube, and/or Zekelman in an action filed against Atain under Cal. Insurance
24 Code section 11580, subdivision (b).

25 58. Atain therefore desires a judicial determination of its rights and liabilities, if
26 any, and a declaration that it has no duty to indemnify MEC, Western Tube, Zekelman
27 and the Zimmerman Children against the claims asserted in the Underlying Action, to
28 satisfy any settlements that may be entered into to resolve that Action, or to satisfy any

1 settlement or judgment that may be entered against MEC, Western Tube, and/or
2 Zekelman in that Action and which and the Zimmerman Children may seek to enforce
3 under Cal. Insurance Code section 11580, subdivision (b).

4 59. Such declaration is necessary and appropriate because Atain has no plain,
5 speedy or adequate remedy at law, and by reason of such delay, will suffer great and
6 irreparable injury. Such a declaration is appropriate in order that Atain, MEC, Western
7 Tube, Zekelman and the Zimmerman Children may ascertain their respective rights and
8 duties under the Atain policy. Such controversy is incapable of resolution without judicial
9 adjudication.

10 60. If the Court determines that Atain owes a duty to indemnify MEC, Western
11 Tube, Zekelman and the Zimmerman Children under Policy No. PRB13725, for some,
12 but not all, of the claims asserted against MEC, Western Tube and Zekelman, Atain is
13 entitled to and desires an allocation between covered and non-covered claims for
14 payment of any settlements or judgments.

15 **THIRD CAUSE OF ACTION**

16 **(Reimbursement of Defense Fees and Costs And Amounts Paid To Indemnify–** 17 **Against MEC)**

18 61. For its Third Cause of Action, Atain incorporates by reference, as if fully
19 restated, paragraphs 1 to 60, above.

20 62. In light of the fact that all of the costs and fees incurred in the defense of
21 MEC with respect to the claims asserted in the Underlying Action are not the
22 responsibility of Atain inasmuch as there is no coverage for these claims under its policy,
23 Atain is entitled to a full and complete reimbursement from MEC of all such fees, costs,
24 paid, incurred, or to be incurred, in connection with the defense of these claims.

25 63. In light of the fact that Atain has no obligation to indemnify MEC against
26 the claims asserted against it in the Complaint filed by the Zimmerman Children or the
27 Cross-Complaint filed by Western Tube and Zekelman, should Atain pay any sums to
28 settle those claims Atain is entitled to full and complete reimbursement from MEC of all

1 such amounts paid to indemnify it in connection with these claims.

2 64. Pursuant to *Scottsdale Ins. Co. v. MV Transportation*, 36 Cal.4th 643 (2005),
3 *Blue Ridge Ins. Co. v. Jacobsen*, 25 Cal.4th 489 (2001), and other cases, Atain is entitled
4 to recover damages from MEC by way of reimbursement of all defense fees and costs
5 incurred or to be incurred in connection with the Underlying Action and any amounts
6 paid by Atain to indemnify MEC against the claims asserted in the Underlying Action in
7 a sum which will be proved at trial.

8 65. If the Court determines there is coverage under Policy No. PRB13725 for
9 some, but not all, of the claims asserted against MEC in the Underlying Action, Atain is
10 entitled to and desires an allocation between covered and non-covered claims, if any.

11 **PRAYER FOR RELIEF**

12 WHEREFORE, plaintiff Atain prays for relief as follows:

13 1. For the First Cause Of Action:

14 For a judgment that, by reason of the terms, conditions, and exclusions in Policy
15 No. PRB13725, no duty to defend is owed to MEC, Western Tube and/or Zekelman with
16 respect to any claims asserted against them in the Complaint filed by the Zimmerman
17 Children or the Cross-Complaints MEC, Western Tube and Zekelman have filed against
18 each other in the Underlying Action, as set forth in the First Cause of Action;

19 2. For the Second Cause of Action:

20 a. For a judgment that, by reason of the terms, conditions, and exclusions in
21 Policy No. PRB13725, no duty to indemnify is owed to MEC, Western Tube and/or
22 Zekelman with respect to any claims asserted against them in the Complaint filed by the
23 Zimmerman Children or the Cross-Complaints MEC, Western Tube and Zekelman have
24 filed against each other in the Underlying Action, as set forth in the First Cause of
25 Action; and

26 b. For a judgment that by reason of the terms, conditions, and exclusions in
27 Policy No. PRB13725, Atain has no obligation to satisfy any settlement or judgement
28 entered in the Underlying Action that the Zimmerman Children may seek to enforce

1 against Atain under Cal. Insurance Code section 11580, subdivision (b), as set forth in the
2 First Cause of Action;

3 3. For the Third Cause of Action:

4 a. For a judgment that Atain is entitled to reimbursement from MEC for any
5 and all sums expended in defense of the claims asserted in the Underlying Action, as set
6 forth in the Third Cause of Action; and

7 b. For a judgment that Atain is entitled to reimbursement from MEC for any
8 and all sums expended to indemnify it against the claims asserted in the Underlying
9 Action, as set forth in the Third Cause of Action;

10 4. If this Court declares that Policy No. PRB13725 applies to some but not all
11 of the claims asserted against MEC, Western Tube and Zekelman in the Underlying
12 Action, Atain seeks a declaration allocating between covered and non-covered claims all
13 fees, costs, expenses, settlements and/or judgments made in connection with the claims
14 asserted in the Underlying Action;

15 5. For an Order authorizing Atain to immediately withdraw from its defense of
16 MEC in the Underlying Action;

17 6. For interest, including prejudgment interest on all defense fees and costs;

18 7. For interest, including prejudgment interest on all sums paid to indemnify
19 MEC;

20 8. As to all causes of action, for costs herein; and

21 9. For such other and further relief as this Court deems just and proper.

22 Dated: November 20, 2023

LEHAVI STARGARDTER, LLP

23 By

: /s/ GailAnn Y. Stargardter

24 GailAnn Y. Stargardter

25 Attorneys for Plaintiff ATAIN

SPECIALTY INSURANCE

26 COMPANY
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